

## **Background Memos**

The following memos provided background information to the participants, and were produced prior to the conference. They do not represent the views of the participants (which have been summarised in the Chairman's Report), nor do they represent an institutional policy of any of the conference organisers.

# **Dutch Norwegian Initiative on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons.**

## **Memo for Workshop 1: Regulating brokering: the scope of controls on arms brokering and links with other legislation**

### **1. The issues**

It is important to develop shared understandings and harmonised definitions of ‘brokering’ and ‘brokers’ to be used in national regulations to control brokering of SALW. Otherwise damaging inconsistencies can exist between national regulations of various countries, creating opportunities for circumvention and obstructing international co-operation.

SALW brokering processes are often complex. The ‘core’ of SALW brokering activity is to arrange, mediate, facilitate, organise or negotiate arms deals between a supplier and recipient for material gain without necessarily taking ownership or possession of the arms. Typically, however, other activities are also an integral part of SALW brokering processes, particularly financial and insurance arrangements for the deals and transportation of the arms.

In order to exercise effective control over brokering activities, States should ensure that they have adequate legislation, regulation and administrative procedures in place to control relevant aspects of SALW brokering, as part of their efforts to prevent and combat illicit arms trafficking in all its aspects. However, there are complex choices to be made about how to develop and maintain such controls.

In practice, national controls on brokering of SALW will normally be embedded in wider national systems to control brokering in all types of arms and other controlled military and dual-use goods, in the same way that SALW export controls are integrated into States’ overall national systems for controlling arms transfers. This does not exclude that stand-alone arms brokering regulations may be preferred by national authorities to exert control over such activities.

### **2. Questions to be addressed in designing regulation**

- How should ‘SALW brokering activities’ and ‘SALW brokers’ be defined for the purposes of national regulations and controls?
- What should be the scope of national regulations to control SALW brokering activities? Is it better to focus such regulations on ‘core’ brokering activities of arranging, mediating, facilitating, or organising arms deals, or should they also cover other activities associated with brokering, including financial arrangements, insurance and transportation of the arms?
- Should national regulations be primarily targeted on controlling ‘brokering activities’ or ‘brokers’?

### **3. Existing and emerging practices**

Although countries that already have national arms brokering regulations differ in their exact definitions of ‘arms brokering’, they are generally very similar in substance. The most common understanding is that the ‘core’ of arms brokering activity is to arrange, mediate, facilitate, organise or negotiate arms deals between a supplier and recipient for material gain without necessarily taking ownership or possession of the arms. ‘Brokers’ are persons or companies that engage in such brokering activities. Any specific national regulations to control SALW brokering activities could therefore be expected to cover such core activity.

There is an emerging shared international understanding that effective arms brokering regulations need to be embedded within a broad system of regulation of transfers of controlled goods (including SALW) and laws criminalising trafficking, money laundering, corruption and other undesirable activities associated with unscrupulous arms brokering and transnational organised crime.

#### **4. Possible options relating to regulation**

##### Regulate ‘brokering activities’ or ‘brokers’?

*Option A:* design national regulations primarily to control arms brokering activities. This may have the advantage of focussing on the core activities of concern, irrespective of how participants in the process are labelled, or choose to label themselves (many of those who engage in brokering activities might do so only occasionally or on the margins of their core activities). In this option, national systems for prior registration of ‘arms brokers’ are not necessary.

*Option B:* design national regulations that impose specific requirements on ‘arms brokers’, as well as on arms brokering activities. This option is associated particularly with regulations that include national systems for prior registration of arms brokers, and will have certain advantages associated with such systems, for example ensuring systematic data collection, facilitating monitoring and reporting, and imposing eligibility requirements on people or companies that wish to broker arms deals.

##### Whether national regulations established to control SALW brokering activities should include associated activities such as financial arrangements and transportation.

*Option A:* target national arms brokering regulations on the ‘core’ brokering activities, and control such associated activities through other laws, including those covering illicit trafficking, money laundering and corruption. This option may avoid laws with inappropriately wide coverage that would capture too wide a set of transportation and financial agents that might be innocently or distantly implicated in brokering arms deals. It thus may avoid imposing excessive economic and administrative costs and be more enforceable.

*Option B:* include financial, transportation and other activities associated with arms brokering within the scope of brokering regulations. This option may ensure comprehensive coverage of regulatory controls that: cover the whole phenomenon; avoid problematic legal distinctions between core and ancillary brokering activities; and potentially increase the prospects for successful criminal prosecution.

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## **Memo for Workshop 2 Licensing of brokering activities**

### **1. The issues**

Since there is a legitimate role for brokers in the international arms trade, effective national regulation of arms brokering requires a national system for licensing such activities. Such a system could increase government oversight over brokering; also, it could make it easier to distinguish between legal and illicit activities. The latter, specifically, would be those conducted without government authorization.

The question of licensing is closely connected with other issues (such as documentation, registration procedures, and the scope of controls and jurisdiction) which are dealt with in the other memos.

A licensing system would allow States to put in place a process whereby the appropriate national authorities assess whether to authorise the proposed brokering of an arms deal. Such a process would involve the submission of appropriate information, documentation and guarantees on the side of the broker; a procedure by which relevant government ministries and agencies assess the application; and a series of principles, established at the national level, to guide decisions on whether to issue a licence. These principles, or criteria, would be a useful means to ensure clarity and consistency in the application of national legislation on brokering of SALW.

As regards the types of licences, decisions taken on a case-by-case basis, issuing brokering licences for each specific deal, would greatly increase the effectiveness of national brokering controls. However, in order to avoid administrative burdens, the possibility to grant open licences could be considered, particularly in those cases in which national authorities assess that the risks associated with the deals to be brokered are very low, where the broker is of the highest standing, and where the proposed deal would only involve transfers between trusted countries that each have strong and effective national arms controls systems. For example, States might exercise the option to issue open licences for brokering deals both between countries that are allies, and involving companies that are in close co-operation in defence production.

### **2. Questions to be addressed in designing regulation**

- What criteria could be established, by national authorities, to guide decisions on the issuing of brokering licences? Should such criteria be specifically designed for the purpose of controlling brokering activities, or could the same criteria used to assess applications for arms transfers be applied?
- What type of licences could be allowed (individual and open) and in what cases?

### **3. Existing and emerging practices**

The criteria for issuing brokering licences would be a national prerogative, although some useful guidelines could be derived from international agreements. In the UN Programme of Action States agreed to "assess applications for export authorisations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade" (II.11).

The UN Disarmament Commission has also established some global guidelines that could be useful. Within the framework of regional organizations, many States have agreed to more specific sets of criteria, such as those developed within the EU, the OSCE and the SADC. All these elements could be taken into account by States to determine the principles, effective at the national level, to be used in deciding on whether to grant or refuse a brokering licence.

National licensing systems for arms transfers typically assess most licence applications on a case-by-case basis. Authorisation, if issued, is in the form of a specific licence for the transfer concerned. However, many States also make some use of open licences. For example, open licences may be issued permitting a specific exporter to transfer certain types of weapons or controlled goods to a particular recipient without requiring specific licences for each deal. General licences may be issued that authorise transfers of certain types or categories of goods to specific recipient countries, such as allies.

### **4. Possible options relating to regulation**

- States could establish effective national licensing systems to regulate and authorise brokering activities, similar to those established for licensing transfers of SALW;
- States could apply the same national criteria for assessing applications for authorisation to broker a specific arms deal as they use in assessing applications for licences to transfer SALW to and from their own territory;
- National authorities could normally consider applications for authorisation of brokering activities on a case-by-case basis. If approved, individual licences for brokering activities would be issued for each deal to be brokered;
- States could allow for the possibility to issue open or general licences for arms brokering activities, particularly where national authorities assess that the risks associated with the arms deal to be brokered are very low. This could be the case, for example, when the broker is of the highest standing, or the proposed deal would only involve transfers between countries that exercise effective controls on arms transfers and have strong national arms control systems.

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**Memo for Workshop 3 Registration requirements for arms brokers**

**1. The issues**

The issue of whether and how to establish systems for registering arms brokers arises because such systems would be needed if national regulations are targeted on brokers as well as on brokering activities. A registration system can also help to facilitate effective monitoring, control, and enforcement of regulations.

Reliable and systematic documentation, as part of a registration system, would be useful for the effective administration and enforcement of national regulations to control SALW brokering, just as it is for effective national controls on transfers of arms and other controlled goods.

End-use and end-user controls would be particularly useful in relation to SALW brokering. Unscrupulous brokers have often been implicated in the diversion or re-export of authorised transfers to illicit or undesirable end-users and/or destinations.

**2. Questions to be addressed in designing regulation**

- Should a registration requirement for brokers be part of a licensing system for brokering activities?
- Should registration be considered as an administrative step, or as an eligibility requirement for the right to broker?
- What documentation should be required for each step of the process of controlling brokering activities (e.g. registration, licensing)?
- Should brokers be required to keep records of their transactions, and could they be requested to make it available to the national authorities?
- Should end-use/end-user controls be included in the licensing procedure for brokering activities?
- Should States, when considering brokering licensing applications, apply restrictions to the possible re-transfer of SALW or to the change of end-user?

**3. Existing and emerging practices**

**3.1 Broker registration systems**

A registration system, including a register of brokers, could strengthen the operation of controls on arms brokering activities by ensuring that systematic information about active brokers is maintained and regularly updated. Requirements that brokers pre-register before being permitted to apply for brokering licences could have a number of aims and functions within an overall national system for controlling brokering activities.

A broker registration system could be helpful to:

- improve administrative efficiency of the overall system for controlling brokering activities;
- exclude dubious persons and companies from legal brokering activities, through imposing eligibility requirements;
- improve enforcement, by offering additional possibilities for penalisation of brokers that contravene procedural or good practice requirements, for example through deregistration.

Some States have chosen not to establish such registration requirements. Depending on countries' particular legal and enforcement systems and traditions, such registers could be developed without imposing pre-registration requirements. For example, such a register could be developed by insisting on the provision of information when applications are made for specific brokering licences.

### **3.2 Documentation**

Requirements for reliable and systematic documentation are commonly established at different phases of the control process: pre-registration of brokers (if required); licence applications; end-user and end-use documentation. Concerning registration, for example, information concerning the applicant is commonly requested, while in some cases details of the arms deal must also be provided.

### **3.3 End-use and end-user controls**

Most national systems for controlling arms transfers require end-use and end-user documentation and guarantees as part of the licence application system. While the stringency and design of national end-use requirements varies substantially between different States, it is widely recognised that there is a need to develop and implement good practices in this area. Would national systems for controlling brokers similarly need to include adequate end-use and end-user requirements? If so, what elements should these include? For example, should end-use/end-user information be included in the documentation submitted by a broker for a licence application? Should restrictions be established relating to the possible re-export or change of end-user?

## **4. Possible options relating to regulation**

- States might find it useful to put in place documentation requirements for brokers as part of their national arms control system. Such documentation requirements could relate to all aspects of the national brokering control system, including registration, licence applications, end-use and end-user information, and post-delivery verification;
- Brokers could be legally required to maintain full documentary records of their activities for as long as possible, and to make them available to national authorities upon request;
- States could establish and maintain adequate end-use and end-user control systems as a key element of the national controls of arms brokering activities. Licences would not be issued without full and appropriate documentation relating to end-use and end-users, and there would be procedures for authentication of such documentation and for checking the accuracy of the information provided. Systems for post-delivery monitoring could similarly be adopted and used;

- States could consider including restrictions or conditions on re-export or change of end-user as part of the brokering licensing system, consistent with their practices and in relation to licences for arms transfers.

States might find it useful to develop and maintain a systematic and reliable data-base of brokers operating within their jurisdiction, whether through a pre-registration requirement or by other means. States could consider adopting a system requiring brokers to register prior to applying for specific licences, and to impose eligibility requirements to prevent inappropriate brokers from legally establishing themselves.

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**Memo for Workshop 4 Extra-territorial jurisdiction**

**1. The issues**

Brokering of SALW is usually a transnational activity. Unscrupulous arms brokers frequently circumvent existing national controls by crossing borders to countries with less stringent, or no, brokering controls. The easy ability to evade national controls in this way undermines the efforts of the international community to control illicit SALW brokering and facilitates illicit trafficking in SALW.

In order to reduce the scope for such circumvention, some States have adopted national brokering legislation that asserts extra-territorial jurisdiction over the brokering activities of their citizens and or of persons and companies that are resident, or established, in their territory. However, States have differing positions on the wisdom or effectiveness of adopting legislation with extra-territorial jurisdiction.

**2. Questions to be addressed when designing regulation**

- What are the advantages and disadvantages of adopting national laws and regulations to control SALW brokering activities with some degree of extra-territorial jurisdiction?
- If States decide that effective controls on SALW brokering activities require some extra-territorial jurisdiction, which options should be adopted?
- What are the challenges (legal, political, practical) of applying and enforcing extra-territorial controls?
- What international guidelines could be adopted relating to extraterritoriality to ensure adequate international co-ordination, in view of the different national positions on this issue?

**3. Existing and emerging practices**

There is emerging agreement that all States should ensure that their national regulations on brokering at least apply to any arms brokering activities conducted within their territorial jurisdiction, whether by their own citizens or by other persons or companies resident, or established, in their territory.

There are different national positions and practices relating to laws imposing extra-territorial controls. Some degree of extra-territorial jurisdiction has been internationally agreed in relation to national legislation on some other issue areas, such as child sex tourism, war crimes, torture and drug trafficking. Nevertheless, the issue remains controversial, and there is as yet no international consensus on whether and how to impose extraterritorial controls in relations to arms brokering.

The UN Group of Governmental Experts established in 1999 (pursuant to UN Resolution 54/54 V) has encouraged States to consider adopting national laws to control all SALW brokering activities, where-ever these take place, by: their national

citizens; persons that are normally resident on their territory; and companies that are permanently based and managed from premises in their territory.<sup>1</sup>

#### **4. Possible options relating to regulation**

##### Extra-territoriality of national laws

There are various ways in which extra-territorial jurisdiction might be included in national laws to control SALW brokering activities. These include:

- Assert full extraterritorial jurisdiction over SALW brokering activities of all national citizens, wherever they may act as brokers;
- Assert extraterritorial jurisdiction over all SALW brokering activities by national citizens of the State, by other persons that are normally resident in its territory, and by companies that are permanently based and managed from premises on its territory;
- Assert extra-territorial jurisdiction for specific categories of arms brokering activities or circumstances, such as brokering activities associated with circumvention of UNSC arms embargoes.

Each of these options have implications for the implementation and enforcement of SALW brokering controls, and the extent to which they might prejudice the livelihoods of citizens that are permanently resident abroad.

##### International guidelines

In view of the differences between States on whether and how to impose some degree of extra-territorial jurisdiction on brokering activities, the following options could be relevant in the development of shared international understandings:

- Develop shared understandings on the issue of extra-territorial jurisdiction;
- Aim to resolve differences and agree common approaches to extra-territorial jurisdiction over SALW brokering;
- Aim to develop some minimum guidelines on possible options in this area, to at least ensure minimum consistency and facilitate international co-operation in enforcement of controls.

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<sup>1</sup> United Nations, *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 V of 15 December 1999, Entitled 'Small Arms'*, A/CONF:192/2 of 11 May 2001.

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## **Memo for Workshop 5 Criminalization, sanctions, and promoting enforceability**

### **1. The issues**

National laws, regulations and administrative procedures designed to control SALW brokering activities cannot be effective without appropriate enforcement. Effective enforcement, in turn, requires the existence of laws defining as crimes violations of brokering regulations, and a system of sanctions and penalties.

The establishment and maintenance of effective enforcement agencies and mechanisms would increase the effectiveness of national brokering controls. Any enforcement system, including criminalization and sanctions, should have sufficient credibility and enforceability to deter non-compliance and encourage wide adherence to requirements.

The challenges of enforcement, and the prospects for successful prosecution, should be taken into account in the design of the brokering control system, and in the formulation of regulations, given that some types of regulations are more enforceable than others.

### **2. Questions to be addressed when designing regulation**

- How could compliance with registration and licensing requirements and obligations be ensured?
- How could licensing requirements, including end-use and end-user requirements, post-delivery verification and traceability of arms shipments, be enforced?
- Should a criminalization regime for non-compliance with arms brokering regulations and procedures be established? What elements should it include?
- What penalties and sanctions for violations of brokering regulations would be appropriate?

### **3. Existing and emerging practices**

It is widely agreed that States should make every effort to ensure that national regulations on arms brokering activities are systematically and consistently enforced. This includes taking measures to ensure that the relevant law enforcement agencies and mechanisms have sufficient capacity to promote, and enforce, compliance with existing regulations.

To ensure that effective controls over registration and licensing requirements are maintained, it is increasingly recognised that it is good practice for States to do the following:

- Establish mechanisms to enable effective co-operation and co-ordination between ministries and agencies responsible for the operation and enforcement of their arms brokering control system;

- Ensure adequate monitoring, documentation requirements, record-keeping and reporting systems are in place to provide assurance of compliance and detect significant non-compliance in a timely way;
- Ensure that there are adequate provisions to enable effective investigation of possible non-compliance.

In existing practice concerning criminalization regimes the tendency has been to find a compromise between the need to fully punish brokers who break the law, and a reluctance to excessively penalise those deemed to have committed 'minor' offences. In most cases this has been achieved by formulating a distinction between serious and minor offences, or between those committed intentionally, and those due to negligence.

As for sanctions and penalties, although there are variations between national systems, a common element is for States to establish the possibility of both custodial (i.e. jail) and pecuniary (i.e. financial) sanctions.

#### **4. Possible options relating to regulation**

- States could consider putting in place mechanisms and procedures for effective interagency cooperation at a national level;
- States could establish legislation that clearly defines as crimes violations of national brokering regulations. In this respect, it may be useful to distinguish between minor offences (for example, the provision of incomplete information in a brokering licence application) and major ones (such as the conduct of a brokering deal without government authorization);
- States might consider developing shared international understandings on penalties and sanctions. For example, common guidelines that penalties should include imprisonment as well as fines, and shared understandings on maximum prison terms. Alternatively, they could agree that those convicted of significant non-compliance must face penalties that are comparable and consistent with national penalties available for illicit trafficking in arms;
- States might develop shared understandings on measures to prevent diversion of brokered SALW deals into the illicit trade. For example, common approaches might be developed to help ensure delivery to authorised end-users. This might, for example, include
  - Establishing requirements for brokers and shippers to provide prior documentation on transportation agents and routes;
  - Establishing requirements for adequate documentation to accompany shipments, and to criminalise false transportation documents;
  - Establishing systems to check delivery to authorised end-users.

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## **Memo for Workshop 6 International co-operation**

### **1. The issues**

Given the transnational nature of brokering activities, international co-operation is important for both developing and enforcing national controls on SALW brokering. While stressing that the primary responsibility lies with national governments, the UN Programme of Action also mentions the benefits that might be derived from cooperation, at both the regional and the global level, in tackling issues related to the illicit trade in SALW, including illicit brokering. Some regional organisations have established relevant co-operation mechanisms, including the EU, the OSCE, the OAS and the SADC.

### **2. Questions to be addressed in designing regulation**

- Which mechanisms could enhance international co-operation with respect to the development and implementation of national regulations on SALW brokering?
- Should States, in a position to do so, consider requests to provide financial and/or technical assistance to enable States to develop adequate national regulations and associated administrative systems on SALW brokering and to deliver capacity building assistance to strengthen enforcement and associated judicial systems?
- How could international co-operation in enforcement be promoted? For example, States could consider establishing extradition procedures for violations of SALW brokering regulations; promote harmonization of national systems, in order to close legal loopholes that unscrupulous brokers might exploit in passing from more to less stringent national jurisdictions; cooperate in intelligence gathering and in the exchange of relevant information.
- How could States utilise existing systems, or organizations, to increase national and international control over brokering activities? For example, are there ways in which Interpol and the World Customs Organization could contribute to the enforcement of controls on arms brokers and/or brokering activities?

### **3. Existing and emerging practices**

Currently, there is little formal international co-operation with respect to the issue of SALW brokering. However, some international agreements have underlined, in general or specific terms, the need for States to coordinate regionally and globally to tackle the issue of illicit SALW brokering. In the UN Programme of Action States agreed to “develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering” (II.39). The OSCE Document recommends that governments require the

registration and licensing of brokers (sec. III.D). The EU has also agreed on guidelines to control brokering activities.<sup>2</sup>

#### **4. Possible options relating to regulation**

- States could consider using their existing national points of contact to facilitate co-operation on issues related to SALW brokering.
- States could consider establishing information exchange mechanisms (bilateral and/or multilateral), covering national contact points, national regulations, experiences with development and enforcement of regulations, and sources of assistance in this area;
- States could develop systems for the exchange of confidential or sensitive information between licensing authorities and enforcement agencies, including black lists of brokers;
- States could make use of existing mechanisms of international cooperation, such as those established with the World Customs Organization and Interpol. These, for example, could be useful in the areas of information exchange, and enforcement.

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<sup>2</sup> *Third Annual Report According To Operative Provision 8 Of The European Union Code Of Conduct On Arms Exports* (2001/C 351/01), pp. 3-4.